

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FREEDOM FOUNDATION, a  
Washington non-profit corporation,

Plaintiff,

v.

JOEL SACKS, in his official capacity as  
Director of Washington State  
Department of Labor & Industries;  
HEATHER NORMOYLE, in her  
individual capacity; and ELIZABETH  
SMITH, in her individual capacity,

Defendant.

CASE NO. 3:19-cv-05937-RBL

ORDER ON DEFENDANT’S MOTION  
FOR PROTECTIVE ORDER AND  
PLAINTIFF’S CROSS-MOTION TO  
COMPEL AND FOR SANCTIONS

DKT. ## 21 & 25

**INTRODUCTION**

THIS MATTER is before the Court on Defendants Joel Sacks, Heather Normoyle, and Elizabeth Smith’s (collectively “the Department”) Motion for Protective Order [Dkt. # 21] and Plaintiff Freedom Foundation’s Motion to Compel and for Sanctions [Dkt. # 25]. Freedom Foundation is an organization that opposes unionization and was present at the Washington State Department of Labor & Industries on June 27, 2019 handing out pamphlets. Employees of the Department asked them to leave, which precipitated this lawsuit based on alleged free speech and other constitutional violations. The parties now dispute discovery served upon Normoyle and

1 Smith, which the Department argues is duplicative and burdensome but which Freedom  
 2 Foundation asserts is legitimate. For the following reasons, the Court GRANTS the  
 3 Department's Motion and DENIES Freedom Foundation's Motion.

#### 4 **BACKGROUND**

##### 5 **1. Freedom Foundation's Claims**

6 On June 27, 2019, three Freedom Foundation canvassers went to the Washington State  
 7 Department of Labor & Industries building "to inform public-sector workers of their First  
 8 Amendment rights, as recognized by the Supreme Court of the United States in *Janus v.*  
 9 *AFSCME*, to refrain from or cease financially supporting their respective unions, allowing the  
 10 unions to speak for them, or associating with their unions against their will." First Amended  
 11 Complaint, Dkt. # 16, at 4-5. Freedom Foundation alleges that its employees got permission from  
 12 the front desk receptionist and a state patrol officer to canvas inside the building. *Id.* at 6-7.

13 They were handing out pamphlets in the "space outside the cafeteria" when they were  
 14 approached Normoyle, the Assistant Director of Human Resources for the Department; Smith,  
 15 Deputy Director of the Department; and three to five state patrol officers "acting at the behest of"  
 16 the Department employees. *Id.* at 8. Normoyle asked if the canvassers had submitted an  
 17 application for their activities, and when they responded that they had not, Normoyle informed  
 18 them that they were in contravention of Department Policy 5.04 and asked them to leave. *Id.* at  
 19 8-9. Freedom Foundation also alleges that one of its canvassers was taking pictures, and one of  
 20 the officers aggressively told him to stop. *Id.* at 9-10. The canvassers left the building shortly  
 21 after. *Id.* at 10.

22 Based on this altercation, Freedom Foundation assert six claims. The first five allege Due  
 23 Process, Equal Protection, Free Speech, and Freedom of Association violations arising from the  
 24

1 discriminatory ejection and silencing of the canvassers, as well as one claim arising from the  
2 officer's attempt to prohibit photography. *Id.* at 13-22. The sixth claim is for declaratory and  
3 injunctive relief. *Id.* at 22. The claims are either against all the Defendants or the Department  
4 alone; none of the claims target the conduct of Normoyle and Smith insofar as it differs from that  
5 of the Department. In fact, their names are not mentioned once in Freedom Foundation's claims.

6 **2. Freedom Foundation's Discovery to the Department, Normoyle, and Smith**

7 On January 8, 2020, Freedom Foundation served its first set of discovery to Sacks, who is  
8 synonymous with the Department in this case. It included 25 requests for admission (RFA) and  
9 25 interrogatories and requests for production (RFP). The Department raised various objections,  
10 including that several questions were compound, but ultimately responded and produced "nearly  
11 12,000 pages of records." Motion, Dkt. # 21, at 4. However, after the parties exchanged emails  
12 about some of the Department's objections, Freedom Foundation served additional RFAs and  
13 interrogatories and RFPs to Defendants Normoyle and Smith.

14 The RFAs to Normoyle and Smith seek the same information as those directed to the  
15 Department. Some also equate the Department's knowledge with that of its employees. For  
16 example, RFA number 17 to the Department states, "Admit that on June 27, 2019, the  
17 Washington State Patrol officers who accompanied Ms. Heather Normoyle and Ms. Elizabeth  
18 Smith in ejecting the Foundation's employees from the Tumwater Building were acting pursuant  
19 to the instructions or direction of the Department," Dkt. # 22-1 at 83; there are identical RFAs  
20 directed to Normoyle and Smith, but the phrase "instructions or direction of the Department" is  
21 replaced with "Your instructions." *Id.* at 7, 47. Other RFAs to the Department address the actions  
22 or knowledge of Normoyle and Smith, while the corresponding RFAs to Normoyle and Smith  
23 address the exact same subject matter. *See, e.g., id.* at 9, 49 ("You knew that Policy 5.04  
24

1 provided no authority . . . .”); *id.* at 85 (“Ms. Heather Normoyle . . . [and] Ms. Elizabeth Smith  
2 knew that Policy 5.04 provided no authority . . . .”). The Department’s response to the RFAs  
3 contains answers from all “Defendants” and provides information about the actions and beliefs  
4 of Normoyle and Smith. *Id.* at 76-86.

5       The interrogatories and requests for production propounded upon the Department, which  
6 address a variety of topics, seemingly differ from those directed to Normoyle and Smith, which  
7 exclusively ask for factual and documentary support for each RFA answer. *Compare* Dkt. # 22-1  
8 at 92-125 *with id.* at 17-35, 57-72. However, interrogatory number 22 to the Department reads,  
9 “Please identify and describe with particularity, in accordance with the foregoing Definitions, all  
10 factual support for Your denial of any of the Requests for Admissions served to You in this  
11 matter, at any time.” *Id.* at 122. Because the RFAs to the Department are the same as those  
12 directed to Normoyle and Smith, this question encompasses *all* of the interrogatories and RFPs  
13 directed to Normoyle and Smith.

14       The Department objected to interrogatory number 22 as compound and stated that “the  
15 factual support for the positions taken with respect to the denial of Requests for Admission is  
16 included in the response to those requests.” Dkt. # 22-1 at 122. The Department’s response to the  
17 Interrogatories and RFPs is signed and verified by Normoyle. *Id.* at 127. In an email exchange,  
18 counsel for Freedom Foundation agreed that question number 22 was compound but suggested  
19 that he had a plan to “circumvent” this issue. *Id.* at 133. This plan, apparently, was to propound  
20 separate discovery on Normoyle and Smith, despite the overlap between the RFAs to the  
21 Department.  
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## DISCUSSION

The Department argues that Freedom Foundation's discovery to Normoyle and Smith is improper because they are only "nominally separate" from the Department itself. Alternatively, The Department contends that the same discovery is unreasonably duplicative, cumulative, and burdensome. Consequently, the Department asks that the challenged discovery be quashed and that the Court issue a protective order that Defendants are to be treated in a unitary fashion for purposes of discovery. Freedom Foundation argues that its discovery approach is legitimate and that the Court should compel responses from Normoyle and Smith. Freedom Foundation makes little-to-no argument for why sanctions are warranted.

Rule 26(b)(1) states that parties may obtain discovery on "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). However, discovery also must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Rule 26(c)(1) states that "a party from whom discovery is sought" may, after a good faith conference, seek "an order to protect [that] party or person from annoyance, embarrassment, oppression, or undue burden." When a party so moves, "the court must limit the frequency or extent of discovery [if it] is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C).

While Rule 33(a)(1) allows up to 25 interrogatories to be served upon each party, some courts have observed that multiple parties on the same side may be treated as one if they are only "nominally separate." *See, e.g., Zito v. Leasecomm Corp.*, 233 F.R.D. 395, 399 (S.D.N.Y. 2006)

(citing Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2168.1 at 261 (2d ed.1994)). In *Vinton v. Adam Aircraft Indus., Inc.*, for example, the court upheld the magistrate judge’s limitation of interrogatories when the plaintiff had taken the position that the corporate defendant and one of its representatives were alter egos and should be “treated as a single, unified entity.” 232 F.R.D. 650, 664 (D. Colo. 2005); *but see 21X Capital Ltd. v. Werra*, No. C06-04135 JW (HRL), 2007 WL 2852367, at \*1 (N.D. Cal. Oct. 2, 2007) (considering the nominally separate doctrine but declining to apply it because the alter ego company was not a party). *Gucci Am., Inc. v. Exclusive Imports Int’l* reached the same conclusion where the defendants were “acting in unison and are represented by the same counsel.” No. 99 CIV.11490 RCC FM, 2002 WL 1870293, at \*5 (S.D.N.Y. Aug. 13, 2002).

Whether the Court relies on Rule 26’s prohibition of overly burdensome discovery or the nominally separate doctrine, additional discovery to Normoyle and Smith is unwarranted. The RFAs to Normoyle and Smith seek the exact same information as those to the Department, which were answered by the Defendants collectively. The Interrogatories and RFPs seek the “factual support” related to the RFAs, but the Department stated in its response to the prior discovery that such information was already included in its answers to the RFAs themselves. By affirming that those answers comprise the “factual support” requested in the interrogatories, the Department incorporated that information into its response. There is no need to waste more time, effort, and paper just so Normoyle and Smith can repeat the same information again.

Further, Defendants in this matter are so closely associated that an additional quota for discovery to Normoyle and Smith is unjustified. Nowhere in its claims does Freedom Foundation distinguish between acts of the Department and those of Normoyle and Smith. FAC, Dkt. # 16, at 13-25. Instead, the Complaint consistently refers to “Defendants” as a single unit, treating

1 Normoyle and Smith as mere vessels of the Department policy at the heart of this case.<sup>1</sup> *Id.*; see  
2 also RFAs to Department, Dkt. # 22-1 at 78-79 (asserting Normoyle and Smith “relied upon  
3 Policy 5.04” when they asked the canvassers to leave). Defendants also share common counsel  
4 (the result of an AG investigation concluding that Normoyle and Smith acted pursuant to their  
5 employment duties) and have acted in unison during this litigation. The discovery propounded  
6 upon Normoyle and Smith further underscores their association with the Department by  
7 requesting no unique information pertaining to them individually. In light of all this, the  
8 separation between Defendants is only nominal.

9 Freedom Foundation seems to believe that, by propounding separate discovery on each  
10 individual Defendant, it will obtain responses that are inconsistent with those of the Department,  
11 creating an opportunity for impeachment. Indeed, Freedom Foundation’s description of its  
12 discovery to Normoyle and Smith as seeking “individual witnesses’ verification of the  
13 Department’s factual position” suggests that this is its main goal. Opposition, Dkt. # 25, at 12.  
14 But this is misguided. Defendants all have the same legal representation and are all high-level  
15 directors at the Department who participated in the responses to Freedom Foundation’s earlier  
16 discovery. When the exact same questions are being posed twice, the chance that Normoyle and  
17 Smith would suddenly deviate from the answers provided previously is so slim as to be  
18 outweighed by the additional burden imposed on Defendants. If Freedom Foundation wants  
19 fodder for impeachment, it would have a much better chance of obtaining it through depositions.

20 Freedom Foundation also argues that suing Normoyle and Smith in their individual  
21 capacities “introduces a slew of issues pertaining to whether they are entitled to qualified  
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23 <sup>1</sup> The only actors that are identified separately are the patrol officers that allegedly prohibited  
24 photography, but Freedom Foundation still claims they acted “with the approval of the  
Department.” FAC, Dkt. # 16, at 18.

1 immunity.” Opposition, Dkt. # 25, at 7. But, as the Department points out, “[t]he reasonableness  
2 inquiry [for purposes of qualified immunity] is objective, evaluating ‘whether the officers’  
3 actions are objectively reasonable in light of the facts and circumstances confronting them,  
4 without regard to their underlying intent or motivation.’” *Peltier v. Sacks*, 328 F. Supp. 3d 1170,  
5 1182 (W.D. Wash. 2018) (quoting *Huff v. City of Burbank*, 632 F.3d 539, 549 (9th Cir. 2011)). It  
6 does not turn on subjective, individualized belief.

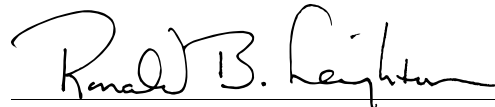
7 In short, this case is about the Department’s policy, not Normoyle and Smith’s individual  
8 actions. Freedom Foundation’s claims rely on Defendants acting under Department authority, its  
9 discovery treats Defendants as a single unit with shared knowledge, and Defendants have acted  
10 collectively in defending this lawsuit. It is therefore duplicative and unduly burdensome for  
11 Freedom Foundation to propound additional discovery on Normoyle and Smith.

## 12 CONCLUSION

13 The Department’s Motion is GRANTED and Freedom Foundation’s Motion is DENIED.  
14 The discovery to Normoyle and Smith is quashed and Defendants shall be treated in a unitary  
15 fashion for purposes of discovery going forward.<sup>2</sup>

16 IT IS SO ORDERED.

17 Dated this 20th day of April, 2020.

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20 Ronald B. Leighton  
21 United States District Judge  
22

23 <sup>2</sup> The Court notes, however, that this Order does not limit Freedom Foundation’s ability to  
24 depose each Defendant separately.